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No. 98-591

In the Supreme Court of the United States

OCTOBER TERM, 1998

ALBERTSONS, INC., PETITIONER,

v.

HALLIE KIRKINGBURG, RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN TRUCKING ASSOCIATIONS, ET AL., IN SUPPORT OF PETITIONER

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27 pp

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Amici American Trucking Associations, Inc. ("ATA"), American Moving and Storage Association ("AMSA"), Towing & Recovery Association of America ("TRAA"), Specialized Carriers & Rigging Association ("SC&RA"), Truckload Carriers Association ("TCA"), National Tank Truck Carriers, Inc. ("NTTC"), Association of Waste Hazardous Materials Transporters ("AWHMT"), and National Automobile Transporters Association ("NATA") respectfully move, pursuant to Rule 37.2 of the Rules of this Court, for leave to file a brief *amicus curiae* in support of petitioner. The consent of counsel for petitioner has been granted; the consent of counsel for respondent has been sought but not obtained.

ATA, a not-for profit corporation, is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. ATA membership includes more than 3,700 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents over 34,000 companies and every type and class of motor carrier operation in the United States. ATA regularly advocates the trucking industry's common interests before this Court and other courts.

AMSA is the national trade association of the moving and storage industry. It has approximately 3,500 members worldwide and represents the entire spectrum of the United States domestic moving and storage industry. AMSA's membership includes 25 national van lines, 1,100 independent regulated carriers, 1,600 agents of van lines (1,000 of whom are also regulated carriers), and over 500 international movers.

TRAA is a national association of more than 1,400 towing and recovery operators serving North America.

TRAA is charged with promoting professionalism, quality customer service, and safety in towing operations throughout the country.

SC&RA is a national association of motor carriers that transport commodities whose unusual size or weight requires special transportation equipment. SC&RA's over 1,000 members include steel haulers, oil field equipment transporters, crane and rigging companies, millwright contractors, and transporters of construction and military equipment.

TCA is a national trade association representing the motor carrier industry's irregular-route truckload segment (such as dry van, refrigerated, flatbed, and dump trailers). TCA's more than 600 motor carrier members are domiciled throughout the continental United States, and serve the United States, Mexico, and Canada.

NTTC is a national trade association of 200 corporate members specializing in transporting hazardous materials, substances, and wastes in cargo tank trucks. Its members operate throughout the United States, Mexico, and Canada.

AWHMT is a national association of motor carriers that transport hazardous waste materials, such as industrial and radioactive wastes. Through its approximately 80 members, the AWHMT promotes professionalism and performance standards that minimize risks to the environment, public health, and safety.

NATA represents motor carriers that transport over 95% of all new motor vehicles through either driveaway or truckaway operations. NATA represents the joint interests of its nineteen carrier members, and seeks continuously to improve their quality of service, safety, and productivity.

Amici believe that their views should provide a useful supplement to the presentations of the parties. A clear,

consistent interpretation of the Americans with Disabilities Act ("ADA") is of paramount importance to *amici*'s members, who employ millions of men and women across the country. In particular, *amici*'s members need guidance on what constitutes a "disability" under the ADA. They must be able to formulate employment standards that ensure their employees do not pose a safety threat, but that at the same time do not discriminate against persons with disabilities who are truly qualified for the job. Of special concern are members' employment standards for over-the-road drivers, whose fitness for employment is crucial to public safety.

The courts of appeals' divergent approaches to the ADA's definition of "disability" have left the process of setting ADA-compliant employment and safety standards largely to guesswork. The lack of certainty and clarity in the disability determination puts members with employees in several circuits at a special disadvantage, since the validity of their employment and safety standards is determined by geographic happenstance. This is antithetical to the ADA's purpose, which is to set a uniform nationwide standard for employing persons with disabilities.

Amici and their membership are committed to equal employment opportunity and believe that discrimination in all forms should be eliminated from the workforce. A uniform definition of disability will help the *amici*, their members, and all employers to achieve this objective.

As set forth in the accompanying brief, *amici* believe that this case provides a suitable vehicle for this Court to settle a well-established circuit split that creates considerable difficulty for their members and for all employers.

Respectfully submitted.

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QUESTION PRESENTED

The *amici curiae* will address the following question:

Whether the Americans With Disabilities Act's definition of disability as a physical or mental impairment that "substantially limits" a major life activity mandates a functional analysis of any actual, significant restrictions that result from the impairment (as most circuits have held), or whether it is sufficient that an impairment merely affects, but does not significantly restrict, a major life activity (as the Ninth Circuit held in this case).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Statutes:

TABLE OF AUTHORITIES—Continued

Miscellaneous:

BRIEF *AMICUS CURIAE* OF THE AMERICAN TRUCKING ASSOCIATIONS, ET AL.

INTERESTS OF THE *AMICI CURIAE*[1]

As explained in the foregoing motion for leave to file this *amicus* brief, the American Trucking Associations, Inc. ("ATA") is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. ATA membership includes more than 3,700 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents over 34,000 companies and every type and class of motor carrier operation in the United States. ATA regularly advocates the trucking industry's common interests before this Court and other courts.

AMSA is the national trade association of the moving and storage industry. It has approximately 3,500 members worldwide and represents the entire spectrum of the United States domestic moving and storage industry. AMSA's membership includes 25 national van lines, 1,100 independent regulated carriers, 1,600 agents of van lines (1,000 of whom are also regulated carriers), and over 500 international movers.

TRAA is a national association of more than 1,400 towing and recovery operators serving North America. TRAA is charged with promoting professionalism, quality customer service, and safety in towing operations throughout the country.

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae*, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

SC&RA is a national association of motor carriers that transport commodities whose unusual size or weight requires special transportation equipment. SC&RA's over 1,000 members include steel haulers, oil field equipment transporters, crane and rigging companies, millwright contractors, and transporters of construction and military equipment.

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NATA represents motor carriers that transport over 95% of all new motor vehicles through either driveaway or truckaway operations. NATA represents the joint interest of its nineteen carrier members, and seeks continuously to improve their quality of service, safety, and productivity.

As set forth more fully in the accompanying motion, *amici* and their members (most of whom have employees in more than one circuit) have a strong interest in the uniform application of the Americans with Disabilities Act ("ADA" or "Act"), including a nationally consistent interpretation of the concept of disability covered by the Act. As the facts of

this case illustrate, the conflict among the circuits as to whether disability under the ADA turns merely on whether a person has an impairment (as the Eighth and Ninth Circuits hold) or instead requires that an impairment substantially limit major life activities (as the Second, Third, Fifth, Seventh, Tenth and Eleventh Circuits hold) creates particular difficulties for employers in the trucking and motor carrier industries, who must balance important obligations of public safety and non-discrimination in employment.

STATEMENT

Petitioner Albertsons is the second largest grocery chain in the country, employing scores of over-the-road truck drivers to transport its goods. Albertsons' company policy is that all drivers must meet minimum Department of Transportation ("DOT") vision standards. Pet. App. 11a. DOT regulations provide that drivers cannot be certified as medically competent to drive unless their visual acuity scores are at least 20/40, corrected, in both eyes. 49 C.F.R. § 391.41(b)(10). When respondent Hallie Kirkingburg began working as a driver for Albertsons in 1990, he did not meet these minimum requirements. Although his right eye has a visual acuity rating of 20/20 with corrective lenses, his left eye visual acuity has been 20/200 since birth, a condition caused by amblyopia (commonly called "lazy eye"). This condition is not correctable with lenses. Kirkingburg's brain, however, has developed subconscious mechanisms to compensate for his condition.[2] Pet. App. 9a-10a, 14a.

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[2] Before working at Albertsons, Kirkingburg held a number of jobs that depended to differing degrees on his ability to see. He trained and worked as a jet aircraft mechanic and crew chief to the basic air commander (1957-1960), worked as an auto mechanic for Los Angeles County (1968-1978 or 1979), and, beginning in 1979, drove commercial vehicles. Appellee Br. at 21 n.6.

Despite failing DOT and Albertsons' vision standards, Kirkingburg was erroneously certified as meeting them by two different medical examiners. In 1991, Kirkingburg injured himself falling from a truck and was out of work for about a year. Before returning, he was required by company policy to undergo another medical examination for recertification. This time, the examining physician correctly determined that the visual acuity in Kirkingburg's left eye was 20/200, a failing grade under DOT and company standards. The physician thus refused to certify Kirkingburg. Pet. App. 10a. Albertsons then determined that Kirkingburg was not qualified to drive the company's commercial vehicles and terminated him from the truck driver position. *Id.* at 11a.

A few months later, Kirkingburg presented the company with a waiver from the Federal Highway Administration ("FHWA") exempting him from the DOT's regulatory requirements under the FHWA's new vision waiver program. Pet. App. 11a, 37a-38a. Out of concern for public and driver safety, Albertsons declined to accept the waiver. *Id.* at 11a, 37a, 41a.

Kirkingburg filed suit in the United States District Court for the District of Oregon, claiming that Albertsons violated the Americans with Disabilities Act, 29 U.S.C. § 12101 *et seq.*, by refusing to accommodate his eye condition. Albertsons moved for summary judgment, arguing that Kirkingburg was not a qualified individual with a disability because he could not perform an essential function of his job—satisfying minimum DOT vision standards. The district court granted summary judgment on this ground. Pet. App. 36a-44a.

In a 2-1 decision, the Ninth Circuit reversed the district court. The majority held that Kirkingburg is disabled under the ADA because his "monocular" vision substantially limits the major life activity of seeing. In the alternative, Kirkingburg at least raised a material fact issue as to whether

Albertsons regarded him as disabled. The majority also held that Kirkingburg raised a material fact question as to whether he could perform the essential functions of a commercial truck driver, and that Albertsons' policy of requiring drivers to satisfy DOT vision acuity standards, without regard to whether they have FHWA vision waivers, is not a valid job-related requirement. Finally, the majority ruled that Albertsons failed to show that Kirkingburg and other waiver recipients posed a direct threat to safety. Pet. App. 8a-28a.

Judge Rymer dissented on the ground that satisfying DOT's usual vision acuity regulations was an essential function of Kirkingburg's job and that Albertsons was not obliged to employ as a driver a person who satisfied only the requirements of FHWA's experimental waiver program, not the DOT safety standards themselves. Pet. App. 28a-33a.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress's goal in enacting the Americans With Disabilities Act was to "provide a clear and comprehensive national mandate" for eradicating disability discrimination through "clear, strong, consistent, [and] enforceable standards." 42 U.S.C. § 12101(b)(1)-(2). To date, ADA jurisprudence has been anything but clear and consistent; it is instead marked by an astonishing absence of standards. Even the very heart of the ADA—its definition of disability—has been the subject of varying, inconsistent interpretations. In particular, the courts of appeals are deeply divided about the legal standard applicable to the first of the ADA's three alternative definitions of disability: "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). While many circuits interpret subsection (A)'s "substantially limits" language to demand a functional analysis of any significant limitations the plaintiff actually experiences, the decision below eschews this analysis, considering a mere "difference"

to constitute a disability without proof of any identifiable limitation.

The ADA, its implementing regulations, and its legislative history all mandate a functional, fact-based approach to determining whether an impairment is substantially limiting. But the Ninth Circuit's "difference" test stops at finding an impairment. Ignoring the statutory phrase "substantially limits," the Ninth Circuit's decision operates in the realm of the hypothetical, speculating without proof that an individual must be disabled by virtue of a particular medical diagnosis.

As the threshold to the Act's protection, the meaning of "disability" must be clear and consistent among all circuits. This Court began the clarification process last term with *Bragdon* v. *Abbott*, 118 S. Ct. 2196, 2202 (1998), which delineated the appropriate three-step analysis under subsection (A): finding an impairment, identifying a major life activity, and conducting a fact-based inquiry into whether the impairment substantially limits the major life activity. The Court should continue this important process by now resolving the circuit split in the third step, settling once and for all the meaning of "substantially limits."

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH RULINGS OF NUMEROUS OTHER CIRCUITS AND OF THIS COURT

The Ninth Circuit held that "there is no question that Kirkingburg is substantially limited in the major life activity of seeing," rendering him disabled under the ADA's first prong. Pet. App. 14a. In support, the court reasoned that Kirkingburg "sees using only one eye; most people see using two." *Id.* at 14a-15a. The court acknowledged that Kirkingburg's brain has made adjustments to compensate for his condition. Nevertheless, it insisted that Kirkingburg's sight

is substantially limited because his peripheral vision and depth perception are "affected" and that "the *manner* in which he sees differs significantly from the *manner* in which most people see." *Id.* at 14a. The court gave no more than lip service to the EEOC's definition of substantial limitation, which requires a significant restriction on major life activities compared to the average person. *Ibid.* (citing 29 C.F.R. § 1630.2(j)(1)(ii)). And it brushed past the factors that the EEOC deems relevant to this analysis—the impairment's severity, duration, and long-term impact. *Ibid.* (citing 29 C.F.R. § 1630.2(j)(2)).

The decision below sharpens a well-defined circuit split on the meaning of the phrase "substantially limits." The Ninth Circuit frankly acknowledged that its analysis conflicts with a Fifth Circuit decision holding that a plaintiff with monocular vision was not disabled because his normal daily activities were not limited. Pet. App. 15a n.4 (citing *Still* v. *Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir. 1997)). But that split also extends far beyond cases involving monocular vision. Addressing all manner of impairments, most circuits have interpreted "substantial limitation" to refer to current, significant functional limitations caused by the impairment, while the Eighth and Ninth Circuits consider mere "differences" or "effects" resulting from an impairment to be substantially limiting.

An example of the first approach is the Second Circuit's decision in *Ryan* v. *Grae & Rybicki P.C.*, 135 F.3d 867, 870-872 (2d Cir. 1998), which held that a plaintiff with colitis was not substantially limited in the major life activities of waste elimination or self-care. Before reaching its decision, the court rejected the notion that an "effect" on a major life activity equals a "substantial limitation":

> Although almost any impairment may, of course, in some way affect a major life activity, the ADA

> clearly does not consider every impaired person to be disabled. Thus, in assessing whether a plaintiff has a disability, courts have been careful to distinguish impairments which merely affect major life activities from those that substantially limit those activities.

Id. at 870 (citing *Roth* v. *Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995)). The court instead inquired whether the impairment caused significant, current functional limitations on the plaintiff's activities, guided by the severity, duration, and impact factors set forth in the EEOC regulations. It determined that, while Ryan's colitis was severe and went "to the very heart of her ability to control the elimination of waste," her showing was weak on duration and long-term impact because she exhibited limiting symptoms only periodically, and not at all in the past two years. *Id.* at 871-872.

The Third Circuit likewise focused on significant, current functional limitations in holding that a plaintiff diagnosed with degenerative hip joint disease was not substantially limited in the major life activity of walking. See *Kelly* v. *Drexel Univ.*, 94 F.3d 102, 106 (3d Cir. 1996). Like the Second Circuit, the Third Circuit looked to the EEOC for guidance, relying in particular on the EEOC's position that "'to rise to the level of a disability, an impairment must significantly restrict an individual's major life activities. Impairments that result in only mild limitations are not disabilities.'" *Id.* at 107 (quoting 2 EEOC Compliance Manual § 902.4, at 902-19). Because the plaintiff had shown only that he had some difficulty walking and climbing stairs, and did not require any assistive devices, his impairment imposed only "moderate," not "significant," restrictions when compared to the average person. *Id.* at 106-107.

Like the Second and Third Circuits, the Fifth, Seventh, Tenth and Eleventh Circuits hold that the statutory phrase "substantially limits" requires a functional assessment of current, significant limitations on major life activities. See *Still* v. *Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir. 1997) (plaintiff whose partial blindness limited peripheral vision was not substantially limited in seeing because he "offer[ed] no evidence that he is unable to engage in any usual activity"); *Roth* v. *Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995) (would-be doctor's eye impairment not disabling because it limited only a narrow range of jobs, not general ability to see; "[t]he key is the extent to which the impairment restricts a major life activity; the impairment must be a significant one"); *Sutton* v. *United Air Lines*, 130 F.3d 893, 902-903 (10th Cir. 1997) (airline pilot applicants who corrected poor vision with lenses were not substantially limited in seeing since they "do not limit their normal daily activities" and admitted they "function identically to individuals without a similar impairment"); *Swain* v. *Hillsborough County Sch. Bd.*, 146 F.3d 855, 858 (11th Cir. 1998) (teacher's incontinence did not substantially limit working because she failed to "provid[e] evidence beyond the mere existence and impact of a physical impairment").

Meanwhile, the Eighth Circuit, like the Ninth, is content to hold that an impairment alone, if manifested in a "difference," is inherently disabling. See *Doane* v. *City of Omaha*, 115 F.3d 624, 627-628 (8th Cir. 1997) (police officer with glaucoma substantially limited in seeing because he is "blin[d] in one eye," which is "significantly different" from the way most people see).[3]

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[3] Related to this circuit split is another—whether the substantial limitation analysis should consider measures used to mitigate an impairment. Most circuits ignore mitigating measures that control otherwise severely limiting impairments, see, *e.g.*, *Arnold* v. *United*

That the circuits apply such fundamentally different legal standards to the ADA's key coverage provision signals an urgent, clear need for this Court's intervention. To make matters worse, the Ninth Circuit's decision side-steps the analysis required by this Court in *Bragdon* v. *Abbott*, the seminal ADA case holding that asymptomatic HIV infection can be a disability. *Bragdon* delineated a three-step analysis for evaluating disability claims under the ADA's first prong. It instructed lower courts to conduct a separate, fact-intensive examination of impairment, major life activity, and substantial limitation. 118 S. Ct. at 2202. At the third step, the Court grounded its substantial limitation analysis firmly in the record evidence. *Id.* at 2206. The court below, in contrast, relied on the mere existence of Kirkingburg's medical condition—that he "sees using only one eye; most people see using two" (Pet. App. 14a-15a)—instead of evaluating his actual limitations, thereby prematurely halting the disability analysis at the impairment stage and allowing the court to ignore evidence that Kirkingburg's brain had compensated for his condition. It is impossible to square *Bragdon*'s insistence on a careful, fact-based inquiry into an individual's limitations with the Ninth Circuit's narrow focus on the existence of an impairment.

Parcel Serv., 136 F.3d 854 (1st Cir. 1998) (diabetes substantially limiting despite amelioration with insulin). Other circuits consider the limits of all impairments in their mitigated state, whatever their nature, see, *e.g.*, *Murphy* v. *United Parcel Serv.*, 141 F.3d 1185 (10th Cir. 1998) (unpublished) (high blood pressure controlled with medication not substantially limiting). The Fifth Circuit holds that mitigating measures may be considered if they "amount to permanent corrections or ameliorations." *Washington* v. *HCA Health Servs.*, 152 F.3d 464, 471 (5th Cir. 1998). This issue is presented in other petitions for certiorari currently before the Court. See *Murphy* v. *United Parcel Serv.*, No. 97-1992 (filed June 9, 1998); *Sutton* v. *United Air Lines*, No. 97-1943 (filed June 1, 1998).

II. THE NINTH CIRCUIT'S DECISION IS ERRONEOUS AS A MATTER OF LAW

As *Bragdon* demonstrates, the ADA's "substantially limits" language demands on its face an analysis of the restrictions imposed by an impairment. By equating an impairment (poor vision in one eye) with a disability, the Ninth Circuit renders the statutory phrase "substantially limits" meaningless.[4]

That is not what Congress intended. Congress borrowed the ADA's definitions of disability from the Rehabilitation Act of 1973 ("RHA"), 29 U.S.C. § 701 *et seq.* See *Bragdon*, 118 S. Ct. at 2202 (the ADA's disability definitions are "drawn almost verbatim" from the RHA). Congress was well aware when it did so that courts interpreting the RHA had held that the phrase "substantially limits" confines coverage to persons whose activities are truly limited. See, *e.g.*,

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[4] The Ninth Circuit's alternative holding that Kirkingburg had raised a fact question about whether Albertsons perceived him as having a disability likewise ignores the phrase "substantially limits." Under 42 U.S.C. § 12102(2)(C), which extends the ADA's protection to a person who is "regarded as having * * * an impairment," the impairment must be perceived as substantially limiting, not just existing. See, *e.g.*, *Kelly*, 94 F.3d at 109; *Sutton*, 130 F.3d at 900-901; *Ryan*, 135 F.3d at 872. The Ninth Circuit's observation that one manager described Kirkingburg as "blind in one eye or legally blind" shows only that Albertsons perceived him as impaired, not that it perceived him as substantially limited. Pet. App. 16a-17a. Three members of this Court have declared that this does not satisfy the "regarded as" prong. See *Bragdon*, 118 S. Ct. at 2214 n.1 (Rehnquist, C.J., Scalia and Thomas, JJ., concurring in the judgment in part and dissenting in part) ("Respondent has offered no evidence to support the assertion that petitioner regarded her as having an impairment that substantially limited her ability to reproduce, as opposed to viewing her as simply impaired").

Forrisi v. *Bowen*, 794 F.2d 931, 934 (4th Cir. 1986) ("requiring a substantial limitation of a major life activity * * * emphasizes that the impairment must be a significant one. It was open to Congress to omit these limiting adjectives, but Congress did not do so"). And Congress "intended that the relevant caselaw developed under the [RHA] be generally applicable to the term 'disability' as used in the ADA." 29 C.F.R. pt. 1630.2(g) app. (EEOC Interpretive Guidance).

The ADA's legislative history confirms that "substantially limits" precludes mere medical diagnoses or impairments from being disabilities under the first prong unless they impose significant functional restrictions. Representative Bartlett, the House Manager of the ADA, put it best: "The ADA includes a functional rather than a medical definition of disability." 136 Cong. Rec. 9072 (1990). Committee reports from both houses likewise state that a "substantial limitation" arises only when "the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." S. Rep. No. 116, 101st Cong., 1st Sess. 23 (1989); H.R. Rep. No. 485, Pt. II, 101st Cong., 2d Sess. 52 (1990). "[M]inor, trivial impairment[s]" are excluded. S. Rep. No. 116, at 23; H.R. Rep. No. 485, Pt. II, at 52.

EEOC regulations and interpretive guidance implement Congress' directive that an impairment must "[s]ignificantly restric[t]" the "condition, manner or duration" of the plaintiff's activities compared to "the average person." 29 C.F.R. § 1630.2(j)(1)(ii) & app. The nature and severity of the impairment, its duration, and its long-term impact are all relevant considerations. *Id.* § 1630.2(j)(2). The EEOC explicitly rejects basing a disability determination on a medical condition (*id.* pt. 1630.2(j) app.):

> The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others * * *.

All these sources require an evidentiary analysis of whether an impairment causes significant life restrictions. The Ninth Circuit simply asserted that Kirkingburg "has monocular vision. Given the nature of the condition and its permanence, there is no question that Kirkingburg is substantially limited in the major life activity of seeing." Pet. App. 14a. Absent from this conclusory statement is any mention of significant restrictions that Kirkingburg experienced compared to the average person. Conveniently ignored were the severity and impact factors, which belied any finding of substantial limitation in light of evidence that Kirkingburg had adapted to his condition.

The Ninth Circuit's decision contravenes Congress's intent to eschew a medical definition of disability in favor of a functional one. The court made no effort to ascertain the effect monocular vision had on Kirkingburg's life. As one commentator observed, the substantial limitation analysis "should emphasize the characteristics of a particular individual, not the abstract question of whether an impairment limits an activity. * * * Both Congress and the agencies have underscored the importance of emphasis on 'substantially.'" Anna P. Engh, Note, *The Rehabilitation Act of 1973: Focusing the Definition of a Handicapped Individual*, 30 WM. & MARY L. REV. 149, 174-175 (1988). That the Ninth Circuit has strayed so far from what Congress intended, and what this Court and the EEOC have required, signals a serious need for this Court's clarification of the phrase "substantially limits."

III. THE ISSUE PRESENTED IS OF GREAT PRACTICAL IMPORTANCE

The Ninth Circuit's faulty analysis has far-reaching practical consequences. A functional standard is crucial for obtaining fair results with so-called "non-classic" impairments (such as depression, non-blinding eye impairments, joint and back ailments, and dyslexia), the limiting effects of which are often not readily apparent. Applying the Ninth Circuit's "difference" test to these impairments would always result in a finding of disability no matter how minor the limitation or how complete the plaintiff's adaptation, pulling within the ADA's coverage "minor," "trivial" impairments that Congress specifically sought to exclude.

A "difference" test also creates a perverse incentive for persons with non-limiting or minor impairments to misrepresent them as limiting when convenient to secure employment. A case in point is *Roth* v. *Lutheran General Hospital*, 57 F.3d 1446 (7th Cir. 1995), in which a would-be doctor claimed he could not pursue his chosen profession because of a visual impairment that prevented working for more than eight to ten hours at a time. Dr. Roth was diagnosed with eye impairments that affected his ability to fuse objects and sense depth. Despite this congenital condition, he completed pharmacy and law degrees—earning the latter full-time while working nights and weekends as a pharmacist—and served as a faculty lecturer and defense attorney/consultant while attending medical school, all without accommodation. On job and school applications, Dr. Roth characterized his vision as "cured." *Id.* at 1448-1449, 1454. The Seventh Circuit denied his request for a preliminary injunction ordering his admission to a residency program, holding that while his impairment "affected" major life activities, it did not "ris[e] to the level of a disability." *Id.* at 1454.

These facts would produce an absurd and unjust result under the "difference" test. Dr. Roth's diagnosed eye impairments and the evidence that they had some effect on his sight would render him disabled under the ADA's first prong. Ignored would be the contrary evidence that his eyes permitted lengthy, uninterrupted, eye-straining work, and the fact that he had represented to employers and educators that his vision suffered no limitations. In short, Dr. Roth used his impairment only when it was convenient—to get him the job of his choice. But as the Seventh Circuit observed, "there is a clear bright line of demarcation between extending the statutory protection to a truly disabled individual (so that he or she can lead a normal life * * *) and allowing an individual with marginal impairment to use disability laws as bargaining chips to gain a competitive advantage." *Id.* at 1460.

The same could be said of Kirkingburg, who performed sight-dependent jobs (including truck driving) for years before joining Albertsons, concealed his condition from the company for two years, then claimed to be disabled because he failed Albertsons' particular job requirement denying waivers from DOT standards. An individual is not "substantially limited" by virtue of exclusion from one job because of its particular requirements.[5]

The ADA should not permit an employee to assert a disabling medical condition, then point to the absence of actual limitations to skirt an employer's legitimate safety

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[5] See *Homeyer* v. *Stanley Tulchin Assocs.*, 91 F.3d 959, 961 (7th Cir. 1996); *Holihan* v. *Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996); *Aucutt* v. *Six Flags Over Mid-America*, 85 F.3d 1311, 1319 (8th Cir. 1996); *Dutcher* v. *Ingalls Shipbuilding*, 53 F.3d 723, 727 (5th Cir. 1995); *Bolton* v. *Scrivner, Inc.*, 36 F.3d 939, 942-943 (10th Cir. 1994).

standards. Many individuals are not significantly restricted enough to be disabled, but nevertheless present genuine safety risks to themselves or others for particular jobs. A police force, for example, is entitled to exclude an officer with 20/200 vision, even if correctable to 20/20, because "officers are not able to call a 'time out' in emergencies while they look for their glasses or lost contact lenses." *Joyce* v. *Suffolk County*, 911 F. Supp. 92, 97 (E.D.N.Y. 1996). A University may prohibit a student with a cardiac defect from playing collegiate basketball to avoid the risk that he will suffer cardiac death. *Knapp* v. *Northwestern Univ.*, 101 F.3d 473, 479-482 (7th Cir. 1996). And a person with a minor sensory deficit in two fingers may be rejected as a firefighter because of the potential for injury if a burning ember drops into his glove. *Welsh* v. *City of Tulsa*, 977 F.2d 1415, 1416 (10th Cir. 1992). As the district court in this case aptly observed, "[i]f plaintiff were ever involved in an accident, defendant would have difficulty explaining why it hired a driver who could not meet DOT vision requirements." Pet. App. 41a. Employers should not have to choose between violating the ADA or being sued for negligence.

Employers cannot rely for protection on the ADA's requirements that employees be "qualified" (*i.e.*, able to perform the job's essential functions and meet job-related requirements) and not pose a direct safety threat. 42 U.S.C. §§ 12112(a), 12113(b). Under the Ninth Circuit's test, individuals who can point to a diagnosed medical condition will be deemed "different" and thus, disabled. Their lack of significant functional limitations, however, will permit a court to find them "qualified" and not a direct safety threat; the court can simply disregard any safety standard excluding these employees as unnecessarily strict.

Employers must be able to rely on a logical, reasoned interpretation of the disability definition to limit the Act's scope to those it was meant to protect. A functional analysis of an impairment's actual, significant restrictions achieves this; the Ninth Circuit's focus on whether an employee has a medical condition does not.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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